The United States Supreme Court Year in Review
2010-2011 Employment Law Cases

By Sharon R. López & David J. Freedman
Triquetra Law Barley Snyder

Cases Reviewed

I. 2010-2011 Term Review

A. Fourteenth Amendment - Privacy Rights*:* *National Aeronautics and Space Administration, et al., v. Nelson et al.,* 131 S. Ct. 746, 178 L. Ed. 2d 667, 2011 U.S. LEXIS 911 (January 19, 2011).

1. **Justices:** Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. Thomas, J., filed an opinion concurring in the judgment. Kagan, J., took no part in the consideration or decision of the case.

2. **Procedural Posture**: Respondent, federal contract employees at National Aeronautics and Space Administration's (NASA) Government laboratory, claimed that two parts of a standard employment background investigation violated a constitutional right to informational privacy. The district court declined to issue a preliminary injunction, but the U.S. Court of Appeals for the Ninth Circuit reversed the decision. The United States Supreme Court granted certiorari.

3. **Issue:** Does NASA's standard form and follow-up questionnaires as part of a standard employment background investigation for employees working under contract violate the employees' federal constitutional right to informational privacy?

   Answer: No. 8-0 (Justice Kagan did not take part in the consideration or decision of this case)

4. **Holding:** Judgment of the Ninth Circuit Court of Appeals was reversed and the case was remanded for further proceedings.

5. **Key Facts:** NASA has a workforce that includes federal civil servants and Government contract employees. A new federal mandate required a standard background investigation on all contract employees that had long-term access to federal facilities by October 2007. The background check includes inquiries about employee drug use treatment and sought employee references regarding the same. All responses are protected under the Privacy Act. Two months prior to the deadline for completing the background check twenty-eighty employees from the JPL brought this suit alleging that the background check violated a constitutional right to informational privacy. The District Court denied the preliminary injunction. The U.S. Court of Appeals for the Ninth Circuit reversed this decision under the holding that SF-85's questions were aligned with the Government's interest in fighting illegal drug use; however, the questions regarding drug "treatment and counseling" did not have a justifiable interest and were likely to be held unconstitutional. Furthermore, the open-ended questions were not narrow enough to satisfy the Government's interest in confirming the identities of the employees and ensuring NASA's security, which likely violates the employees' constitutional rights to information privacy.

6. **Rationale:** The Respondents in this case claim that two sections of a standard employment background investigation violate their rights under *Whalen v. Roe* and *Nixon v. Administrator of General Services*, which are two cases that were decided over 30 years ago by the Court and that reference constitutional privacy "interest in avoiding disclosure of personal matters."

   The Court assumed that the Government's challenged questions suggest a privacy interest of constitutional importance. However, the Court held that the privacy interest, does not disable the Government from asking its employees reasonable questions like the ones found in the investigative background checks, especially since the information is protected under the Privacy Act's safeguards against public disclosure.

   The Court noted that the challenged questions are used in standard employment background checks completed by millions of private employers. The Court also noted that the questions regarding treatment and counseling are intended to separate the employees that use illegal drugs, but are taking measures to address and overcome their problems. This can play a role in determining if the employee can have long-term access to federal facilities.

   Concurrence: Justice Scalia agreed with the outcome but noted the Respondents argued a violation to the Due Process Clause, which does not ensure specific liberties, but it "guarantees certain procedures as a prerequisite to the deprivation of the liberty." Respondents did not claim that the State deprived them of liberty without the requisite procedures and, therefore, the due process claim fails. Justice Scalia expressed concern that the Court's indication that procedural due process claim might be recognized will open the door to a flood of spurious claims.

B. ERISA: *Cigna Corp. v. Amara***,** 131 S. Ct. 1866, 179 L. Ed. 2d 843, 2011 U.S. LEXIS 3540 (May 16, 2011).

1. **Justices:** Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Alito, and Kagan, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. Sotomayor, J., took no part in the consideration or decision of the case.

2. **Procedural History:** The district court found CIGNA violated its obligations under ERISA, reformed the plan and ordered CIGNA to play benefits accordingly. CIGNA appealed to the Second Circuit Court of Appeals. The second circuit affirmed with a summary opinion. The United States Supreme Court granted certiorari to decide whether the district court applied the correct legal standard: whether the "likely harm" is the correct standard to apply when determining sufficient injury to entitle plan participants to recover benefits based on faulty disclosures.

3. **Issue:** Whether "likely harm" is the correct standard of harm to apply when granting appropriate equitable relief for ERISA violations under Section 502(a)(3)?

   Answer: No. The relevant standard of harm will depend upon the equitable theory under which the district court provides relief.

4. **Holding:** Although the district court did not have authority under § 502(a)(1)(B) of ERISA to reform CIGNA's pension plan, it did have authority to do so under another provision, § 502(a)(3). Judgment of the Second Circuit Court of Appeals was vacated, and the case remanded.

5. **Key Facts:** CIGNA's employee pension plan previously provided employees an annuity based on preretirement salary and years of service. In 1998 CIGNA changed the plan, which converted the already-earned benefits into a new opening amount. Respondent beneficiaries of the previous pension plan filed suit challenging CIGNA's adoption of the plan. They argued CIGNA failed to give them proper notice of the less generous benefits provided in the new plan. The district court ordered: 1) the plan reformed to protect and restore the plan participants; 2) the plan administrator to enforce the plan by reforming the records of the plan participants so they would receive the annual annuity under the old plan, plus the benefits under the new plan; and 3) the participants could bring a civil action under ERISA § 502(a)(1)(B) to recover benefits due. CIGNA argued that the statutory provision cited by the District Court does not authorize such relief.

6. **Rationale:** The Court reviewed the district court's analysis of the deficient CIGNA notice, wherein the district court found that CIGNA's omission in their notice to the beneficiaries violated ERISA § 204(h) and ERISA §§ 102(a) and 104(b).

   The provision used by the district court, § 502(a)(1)(B), gives courts the authority to enforce the "terms" and conditions of benefits plans. The Solicitor General argued that

this power, to enforce benefit plans, allows courts to enforce the summaries of plan modifications as well. But, the Court reasoned, though plan summaries *explain* the plan, plan summaries are not actually part of the actual plan. Accordingly, plan summaries cannot be enforced under ERISA § 502(a)(1)(B).

The Court found that making plan summaries legally enforceable would defeat the purpose of the plan summary: "clear, simple communication." Knowing that plan summaries are enforceable would effectively force Plan Administrators to contain the entire plan – complete with legalese – within the plan summary. If this were the case, the summary would no longer be an instrument for simple communication to plan participants. The Court concluded that the summary documents do constitute the terms of the plan for purposes of § 502(a)(1)(B) and the district court did not have authority to reform CIGNA's plan under this section.

The Court did find that the relief ordered by the district court falls within appropriate equitable relief found within § 502(a)(3). The Court noted that the district court's concern with Court's prior holding in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), was misplaced because the relief sought in *Mertens* was legal not equitable. It further noted that this type of lawsuit was traditionally brought in a court of equity, not a court of law. The Court found the district court relief was akin to traditional equitable relief, *i.e.*, injunctions, mandamus, and restitution. "Indeed, a maxim of equity states that '[e]quity suffers not a right to be without a remedy.'" *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) citing R. Francis, Maxims of Equity 29 (1st Am. ed. 1823). The Court found reformation of contracts and restitution under an estoppel theory consistent with traditional equitable relief. In any event, the Court could not determine which remedy the district court imposed under any particular theory.

The Court remanded directing that any requirement of harm must come from the law of equity that determines the harm. The Court further clarified that although actual harm to the participant must be shown, detrimental reliance is not required. The Court remanded and ordered the district court to determine what appropriate remedy may be imposed under § 502(a)(3).

7. **Concurrence:** (Scalia, joined by Thomas, J.J.) Justice Scalia would join the Court in finding that § 502(a)(1)(B) of ERISA does not provide the type of relief that the district court ordered. However, Justice Scalia would refuse to continue the analysis after determining that the lower court applied the wrong section. He would not have engaged in an analysis of the relief available under § 502(a)(3).

C. Class Action & Title VII Claims: *Wal-Mart v Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 2011 U.S. LEXIS 4567 (June 20, 2011).

1. **Justices:** Scalia, J., delivered the opinion of the Court, in which Roberts C. J., and Kennedy, Thomas, and Alito, JJ., joined, and in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined as to Parts I and III. Ginsburg, J., filed an opinion concurring in part and dissenting in part, in which Breyer, Sotomayor, and Kagan, JJ., joined.

2. **Issue:** Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)?

3. **Holding:** Because *Rule 23* requires commonality and the class members cannot show commonality as to the reason why they were treated in a disparate manner, the class certification fails.

4. **Key Facts:** Plaintiffs, a group of about 1.5 million current and former female Wal-Mart employees, filed suit against Wal-Mart under Title VII alleging that Wal-Mart allows its district and regional managers to exercise subjective discretion in determining wages, promotions, and placement in job training programs, and that this policy has a disparate impact against women. Plaintiffs also alleged that Wal-Mart's refusal to correct the effects of this policy amounts to disparate treatment against them. Plaintiffs explained that Wal-Mart's "corporate culture" allows bias against women to influence managers' discretionary pay and promotion decisions, and plaintiffs suffered as a result.

   Plaintiffs attempted to obtain class certification under Rule 23(a) and 23(b)(2). To satisfy Rule 23(a)(2)'s requirement of showing "questions of law or fact common to the class," plaintiffs offered 1) statistical evidence of pay and promotion disparities, 2) anecdotal evidence from 120 plaintiffs, and 3) the expert testimony of a sociologist "who conducted a 'social framework analysis' of Wal-Mart's 'culture' and personnel practices, and concluded that [Wal-Mart] was 'vulnerable' to gender discrimination." The district court certified the class.

5. **Procedural History:** Wal-Mart appealed, and the Ninth Circuit affirmed in almost all respects. The United States Supreme Court granted certiorari to decide whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

6. **Rationale:** Class certification under Rule 23(a) requires the following four requirements among the plaintiffs: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. The issue in this case is whether the plaintiffs all satisfy the second requirement: commonality. A showing of commonality requires a demonstration "that the class members 'have suffered the same injury.' " This requires more than a showing that the defendant has violated a provision of law. For instance, Title VII has multiple avenues for proving discrimination, including intentional discrimination and disparate impact. The mere fact that the plaintiffs' claims all fall

under a single theory, such as disparate impact, is not enough to show commonality. Commonality requires a common contention among the class members, which means that the yes or no answer to that common contention "will resolve an issue that is central to the validity of each one of the claims in one stroke."

Rule 23 precludes class certification where the four Rule 23(a) requirements are not factually proven. Accordingly, district courts may find it necessary to engage in a rigorous analysis of the merits of the claims to determine whether, in fact, the class members can factually prove commonality. This is the case here, where the class members' merits contention is whether Wal-mart engaged in a pattern and practice of discrimination. Proving commonality in this case will necessarily require that the class members also prove that they all similarly satisfy Title VII's requirements of showing the "reason for the particular employment decision."

Here, the class members' claims include millions of different employment decisions, and there is not enough to prove that the reasons underlying these employment decisions can be answered altogether. In sum, the class members failed to "produce a common answer to the crucial question why was I disfavored."

The Court found a lack of typicality and commonality among the class members, and recommended a few ways to satisfy these requirements. For instance, if the class members could show that the employer "used a biased testing procedure to evaluate" its employees, a class of employees who were similarly harmed by this test might satisfy the commonality and typicality requirements. In this case, Wal-Mart is not using any company-wide testing procedure. Instead, it avoids this problem altogether by allowing discretionary decision-making.

Plaintiffs presented expert testimony but the expert could not say whether only 0.5% or 95% of the employment decisions were influenced by Wal-Mart's corporate culture of bias against women. Therefore, the Respondents do not have the "significant proof" necessary to satisfy the commonality requirement.

The district court's reasoning that "an employer's undisciplined system of subjective decision-making" can be enough to satisfy Title VII's disparate impact theory was insufficient in this case because there is no evidence demonstrating the actual reasons for the managers' employment decisions. Some employees could have been denied a promotion because of intentional discrimination by the manager, while others could have been denied a promotion because of sex-neutral criteria.

The plaintiffs' attempt to show commonality through statistical analysis is insufficient. Although these statistics may show regional or national disparities in pay and promotion practices, they fail to show disparities at the individual store level. Moreover, even if the statistics demonstrated pay and promotion gender disparity at each individual store, this is not enough to show commonality for the purposes of Title VII's disparate impact theory. The disparity must be sufficiently linked to a specific challenged employment practice.

Plaintiffs' anecdotal evidence also falls short of demonstrating commonality. Here, the plaintiffs produced about 120 affidavits of discrimination, with more than half of these reports from Wal-Mart employees in only six states. The ratio of the number of anecdotes to the number of class members, 1 per 12,500 class members, is insufficient to infer company-wide discrimination. In contrast, the Court previously reasoned that such anecdotes were sufficient when they are "spread throughout" the company and constituted a ratio of 1 anecdote per 8 class members.

Rule 23(b)(2) allows certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." This requirement means that class certification is proper "only when a single injunction or declaratory judgment would provide relief to each member of the class." Certification under Rule 23(b)(2) is not proper when the class members are entitled to individualized monetary relief.

7. **Dissent:** Justice Ginsburg and the other dissenters agreed that the class should not have been certified under Federal Rule of Civil Procedure 23(b)(2). But the dissenters would have limited the opinion to this issue and not dealt with the specific requirements of Rule 23(b)(3) as not before the Court.

D. Federalism & Pre-Emption of Immigration Laws: *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 179 L. Ed. 2d 1031, 2011 U.S. LEXIS 4018 (May 26, 2011).

1. Justices: Roberts, C. J., delivered the opinion of the Court, except as to Parts II-B and III-B. Scalia, Kennedy, and Alito, JJ., joined that opinion in full, and Thomas, J., joined as to Parts I, II-A, and III-A and concurred in the judgment. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Sotomayor, J., filed a dissenting opinion. Kagan, J., took no part in the consideration or decision of the case.

2.Issues:

I. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

II. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by federal law that specifically makes that system voluntary.

III. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens.

3. Holding: The judgment is affirmed. The Arizona statute is neither expressly nor impliedly preempted. The employer sanctions set forth in the statute fall squarely within the Federal law licensing exception of the Immigration Reform and Control Act. States are not prevented from requiring employers to verify their employees with a federal electronic verification system.

4. Key Facts: Congress enacted the Immigration Reform and Control Act ("IRCA") which, among other things, made it "unlawful for a person or other entity . . . to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." Although employers are required to verify that employees are not illegal aliens, the IRCA does not require employers to use any specific program or system to verify their employees. In fact, the IRCA prevents the Secretary of Homeland Security from requiring employers or governments to participate in a federal electronic verification program (which is called E-Verify.) The IRCA specifically preempts state or local governments from "imposing civil or criminal sanctions (**other than through licensing and similar laws**) upon those who employ, recruit or refer a fee for employment, unauthorized aliens."

Following the IRCA, Arizona enacted the Legal Arizona Workers Act ("Act"). The Act required that employers use the federal E-verify system to verify the work eligibility of its newly hired employees. The Act also proscribed employers from knowingly and

intentionally employing illegal aliens. Employers who violated the Act were penalized. Penalties for violating the Act included the suspension or permanent revocation of "all licenses held by the employer," including the employer's "articles of incorporation," "certificates of partnership," and State grants of authority to conduct business with foreign entities.

5. **Procedural History:** The Chamber of Commerce ("the Chamber") and other affected parties filed suit in federal court, requesting the court to prevent Arizona from enforcing the Act. The district court held that the Act was not preempted, but was consistent with the requirements and proscriptions of the IRCA and other federal laws. The Ninth Circuit affirmed in all respects.

6. **Rationale:**

Issue I: The plain wording of the IRCA expressly proscribes States from imposing civil or criminal penalties on employers who employ illegal aliens. However, IRCA has an exception, which allows States to impose civil and criminal penalties in such situations "through licensing and similar laws." The Arizona Act falls within this exception of the IRCA as a licensing law. The Act's definition of "license" is substantially similar to the federal government's definition as stated in the Administrative Procedure Act ("APA"). The Act's classifications of "articles of incorporation," "certificates of partnership," and State grants of authority to conduct business with foreign entities as "licenses" are consistent with the APA's and Webster's definitions of "license." At the very least, such articles, certificates, and grants fall within the IRCA's exception as a law "similar" to a licensing law.

The Chamber argued that the IRCA demonstrates Congress' desire to retain uniform immigration enforcement across the nation. The Court disagreed, again looking at the plain text of the IRCA's licensing exception, which expressly *allows* individual States to enforce their own civil or criminal penalties on employing illegal aliens by way of "licensing and other similar laws."

Issue II: The Chamber argued that the Act violated the spirit of the IRCA because IRCA carefully balanced many public policy issues, including "deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination." Accordingly, the Chamber asserted, the harsh penalties in the Act "exert an extraneous pull on the scheme established by Congress." The Chamber pulled this reasoning from other cases concerning state actions that conflicted with the administration of federal programs. The Court distinguished the Arizona Act from the cited cases by pointing out the other cases involved "uniquely federal areas of regulation." The Court also explained that, unlike the cases cited by the Chamber, the Arizona Act does not interfere with the operation of a federal program.

Issue III: The Act's requirement that employer's use E-Verify to verify the work eligibility of its employees is not impliedly preempted. Although the IRCA has a

provision that specifically proscribes the Secretary of Homeland Security from requiring the State or local use of E-Verify, it says nothing about the extent to which States may require the use of E-Verify. In fact, the federal government recently asserted in another case that the E-Verify provision does not prevent States from requiring use of the system.

Dissent: Justice Breyer dissented, claiming that the Court's interpretation of "license" in the IRCA's licensing exception was too broad. Justice Breyer explained that the context of the IRCA, which is found in both the statutory text and the legislative history, requires a more restricted interpretation of licensing. Justice Sotomayor also dissented, asserting that the IRCA only allowed states to impose licensing sanctions on employers *after* the employer was held to have violated the IRCA. Both Justices Breyer and Sotomayor argued that the Act's E-Verify requirement is preempted because it runs contrary to the Congress' objective of creating a voluntary verification program.

E. Title VII Retaliation & Family Members who are Employees of the Same Employer: *Thompson v. North American Stainless*, 131 S. Ct. 863, 178 L. Ed. 2d 694, 2011 U.S. LEXIS 913 (January 24, 2011).

1. **Justices:** SCALIA, J., delivered the opinion for a unanimous Court.

2. **Issue:** Whether Title VII prohibits employers from retaliating against an employee who engaged in protected activity, by taking adverse action against that employee's relative or close associate who is also an employee of the company?

3. **Holding:** A co-worker who is a close family member of a person who engaged in protected activity under Title VII is an aggrieved person for the purposes of standing and may bring suit to seek remedy. Judgment of the Circuit Court of Appeals was reversed and the case was remanded for further proceedings.

4. **Key Facts:** Thompson's fiancée, Miriam Regalado, filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against North American Stainless (NAS). Three weeks later, NAS fired Thompson, who then filed his own charge and suit alleging Title VII retaliation for his fiancée for filing her sex discrimination charge. Title VII prohibits discrimination against an employee for filing a charge under Title VII, and permits, a "person claiming to be aggrieved…by [an] alleged employment practice" to file a civil action § 2000e-5(5)(1).

5. **Procedural History:** Plaintiff, former employee, sued defendant, former employer, under 42 U.S.C.S. § 2000e-3 of the Title VII of the Civil Rights Act, claiming that he was fired because his fiancé, also an employed by the defendant, had filed a sex discrimination charge. The district court granted NAS summary judgment ruling that third-party retaliation claims are not allowed by Title VII. The en banc sixth circuit affirmed the decision reasoning that Thompson cannot sue NAS for retaliation since he did not engage in protected activity under Title VII. The U.S. Supreme Court granted certiorari.

6. **Rationale:** Title VII states that an employer cannot discriminate against any employee for filing a charge under Title VII. Because of the procedural posture the Court was required to assume that NAS fired Thompson with the intention of retaliating against Regalado for filing her charge.

   Title VII's anti-retaliation provision does not allow an employer to engage in action that would dissuade a reasonable employee from making or supporting a charge of discrimination. In this case, the Court concluded that a reasonable individual would be discouraged from filing a charge if he/she knew that his/her fiancée would be fired as a result. The Court also proceeded to specify that third-party relationships that are protected under the Title VII cannot include mere acquaintances. However, a close family relative would most likely be protected under Title VII.

Secondly, the Court stated that Thompson is allowed to sue NAS since he was aggrieved and he received injury that the defendant caused and is remediable. In doing so, the Court negated the dictum of prior cases addressing standing under Title VIII (Fairing Housing) where the Court appeared to limit standing to sue.

The Court declined to adopt a categorical prohibition on third-party reprisal suits or to identify a fixed class of relationships for which third-party reprisals are unlawful. Title VII allows any plaintiff with an interest related to the statutory prohibitions of Title VII to bring suit.

7. **Concurring:** Justice Ginsburg would have adopted a broader standard. (Relatives who work for the same employer have standing to bring claims if a relative engages in protected activity.)

F. FLSA Retaliation & Oral Reports: *Kasten v. Saint-Gobain*, 131 S. Ct. 1325,179 L. Ed. 2d 379, 2011 U.S. LEXIS 2417 (March 22, 2011).

1. **Justices:** Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Alito, and Sotomayor, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Kagan, J., took no part in the consideration or decision of the case.

2. **Issue:** Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provisions of 29 U.S.C. § 215(a)(3)?

3. **Holding:** For purposes of the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), the term "filed any complaint" includes both oral and written complaints.

4. **Key Facts:** Kevin Kasten, an employee for Saint-Gobain, suspected that Saint-Gobain was violating the FLSA. According to Kasten, Saint-Gobain put its time-clocks in an area that prevented workers from receiving compensation for time spent donning and doffing work gear. Believing that Saint-Gobain's time-clock placement was unlawful, Kasten brought it to the attention of the human resources department and his supervisors. Kasten told these individuals that he thought the time-clock placement was illegal and that he "was thinking about starting a lawsuit about the placement of the time clocks." Kasten also told them that if he did sue the company, Saint-Gobain would "lose."

   At some point after he complained, Saint-Gobain disciplined and terminated Kasten, who filed suit, alleging that these acts were in retaliation for Kasten complaining about Saint-Gobain's time-clock placement, in violation of the FLSA. Saint-Gobain eventually sought summary judgment on Kasten's claim.

5. **Procedural History:** The district court ruled in favor of Saint-Gobain, holding that Kasten's oral complaints were not protected from retaliation by the FLSA. On appeal, the Seventh Circuit Court of Appeals affirmed. The U.S. Supreme Court granted certiorari.

6. **Rationale:** The FLSA protects employees who "filed any complaint" about an FLSA violation. The text and context of the term "file" necessarily includes oral complaints. The text of the provision is inconclusive, yet it suggests a more broad definition of the word "file." From a practical perspective, a restricted interpretation of the FLSA's anti-retaliation provision would seem to conflict with Congress' objectives in enacting the FLSA. The purpose of the FLSA was to set the floor for wage and hour practices and allow employees to enforce these standards when employers ventured below that floor. The anti-retaliation provision bolsters this objective by giving employees meaningful recourse if the employer decides to retaliate. Considering that most employees were illiterate and uneducated when the FLSA was enacted, only protecting the rights of

employees who made *written* complaints of unlawful behavior would run counter to Congress' intent.

Restricting the scope of the anti-retaliation provision would frustrate the methods in which complaints can be received by government and employers. Government would not be able to receive oral complaints from employees, whether over the phone or face-to-face. Moreover, it would create a disincentive for workers to raise their concerns orally in the workplace, especially through an employer's internal grievance process. A broad definition of the FLSA's anti-retaliation provision is consistent with the Court's interpretation of the anti-retaliation provision in the National Labor Relations Act (NLRA). The NLRA's provision states that it only protects employees who have "filed charges or given testimony." However, the Court has held that proper enforcement of the NLRA requires that protection extend to employees who have neither filed charges nor given testimony.

Because the FLSA requires that employers receive "fair notice" of a complaint, the oral complaint must meet a certain threshold. The complaint must have "some degree of formality," to the extent that the employer would be on notice that the complaint is serious. In other words, the employer should "reasonably understand the matter as part of its business concerns."

Saint-Gobain argued that Kasten's complaint is not protected in another way; that the FLSA only protects complaints to the government and not to employers. However, because Saint-Gobain did not raise this issue in the petition for certiorari briefs, the Court declined to consider it.

Dissent: Justice Scalia asserted that FLSA only protects complaints filed with the government, and not to employers. Because Kasten complained to his employer, the decision below ought to be affirmed on the grounds that Kasten had not engaged in protected activity.

G. USERRA; The Cat's Paw Theory of Liability: *Staub v. Proctor Hospital***,** 131 S. Ct. 1186, 179 L. Ed. 2d 144, 2011 U.S. LEXIS 1900 (March 1, 2011).

1. **Justices:** Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. Kagan, J., took no part in the consideration or decision of the case.

2. **Procedural Posture**: Staub obtained a favorable jury verdict on a claim that his Employer, Proctor Hospital, terminated him in violation of the Uniform Services Employment and Reemployment Rights Act. On appeal, the Seventh Circuit Court of Appeals reversed, holding that Proctor was entitled to judgment as a matter of law. Staub sought review and the United States Supreme Court granted certiorari.

3. **Issue:** Whether an employer can be held liable based on the unlawful animus of a non decision maker when that non decision maker had some influence, but not singular influence, over the decision maker?

4. **Holding:** If a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if the resulting adverse employment action is a proximate cause of the ultimate employment action, then the employer is liable under USERRA. An independent investigation does not insulate the employer from liability.

5. **Key Facts:** Staub was a member of the Army Reserve who spent the bulk of his time in the civilian world working for Proctor Hospital ("Proctor") as an angio technician. Staub received a disciplinary warning from Mulally (immediate supervisor) that required him to report to Mulally or Korenchuk (Mulallu's supervisor) when his cases were completed. Proctor's vice president of human resources (Buck) received a report from Korenchuk stating that Staub had violated a company rule that required him to stay in this work area during the time he was not working with a patient. As a result of this report, Buck reviewed Staub's personnel file and terminated him from his position in 2004. Staub filed a grievance claiming that Mulally fabricated the allegation that led to his termination out of hostility towards his military obligations, but Buck adhered to Mulally's decision. Staub sued Proctor under USERRA. Staub claimed that Mulally and Korenchuk were motivated by hostility toward his military obligations and their actions influenced Buck's termination decision.

6. **Rationale:** USERRA prohibits an employer from denying "employment, reemployment, retention in employment, promotion or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service," 38 U.S.C.S. §4311(a), and provides that liability is established "if the person's membership… is a motivating factor in the employer's action," §4311(c). For the employer to be liable under USERRA, 1) the supervisor must perform an act motivated by antimilitary animus; 2) the act must be a proximate cause of the ultimate employment action.

In this case, Staub claims that Mulally and Korenchuk acted motivated by their animus towards his military obligations, which violates the 38 U.S.C.S. §4311(a). Also, the supervisor must act with the intent to cause the adverse employment action. There was evidence that Korenchuk wanted to get Staub fired. She had asked Staub's co-worker, Leslie Sweborg, to "help her 'get rid of him' [Staub]." Also, Korenchuk made negative reports of Staub with the intention of leading to Staub's termination. Lastly, under the Cat's Paw rule the supervisor's discriminatory actions must be "causal factors underlying" the ultimate decision to effect the adverse employment action. In this case, Korenchuk's report led to the termination of Staub's employment at Proctor Hospital.

Under the Cat's Paw rule an independent investigation by the final decision maker does not automatically shelter the employer from liability. However, "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable."

7. **Concurrence:** Justice Alito agrees with the Court decision, but based on the statutory text and not on the principles of agency.

H. Public Employee – Right to Petition Cause of Action where there is no Public Concern: *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 180 L. Ed. 2d 408, 2011 U.S. LEXIS 4564 (June 20, 2011).

1. **Justices:** Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part.

2. **Procedural Posture:** Guarnieri filed suit against the borough and council-members pursuant to 42 U.S.C. § 1983. After Guarnieri prevailed at trial, the Defendants appealed to Third Circuit. The Third Circuit affirmed. The Defendants filed a petition for certiorari and the United States Supreme Court granted it.

3. **Issue:** Can public employees sue their employers under the Petition Clause for adverse employment actions allegedly resulting from the employees' petitioning on matters of purely private concern?

4. **Holding:** A government employer's allegedly retaliatory actions against an employee do not give rise to liability under the First Amendment's Petition Clause unless the employee's petition relates to a matter of public concern.

5. **Key Facts:** Upon being terminated as chief of police by the Borough of Duryea, Plaintiff Guarnieri filed a grievance challenging the decision. The grievance resulted in arbitration, where the arbitrator ordered that Guarnieri be reinstated even though the arbitrator also found that Guarnieri had engaged in misconduct. When Guarnieri returned to work, the council issued eleven directives relating to his job performance, including orders that Guarnieri obtain "express permission" before working overtime. Guarnieri construed these directives as the council's way of retaliating against him for filing a grievance. He filed suit and the jury found in his favor.

6. **Rationale:** Public employees under the Speech Clause are protected if they meet the "public concern" test. If the speech is of public concern then the court will engage in a balancing test that weighs the employee's right to engage in speech against the government employer's interests, including its interests in ensuring that its operations are efficient and effective. Although the balancing test ultimately reconciles these competing interests, the "public concern" test was developed as a means of protecting these government interests at the front end.

   The Court concluded that the government's interests in maintaining its efficient and effective operations is no less substantial when public employees assert their rights under the Petition Clause. Employee grievances can be very disruptive. To safeguard its interests in maintaining its effective and efficient operations, government must have the ability to discipline or restrain employees who abuse the grievance process or disrupt proper performance of government functions.

Allowing public employee Petition Clause cases to proceed on matters of private concern would be unnecessary when the employees already have the right to file grievances or litigate. Many state and federal statutes already grant public employees in Pennsylvania protection from retaliation by government. Where public employees do not receive protection from retaliation for their petitions, state and local governments are fully capable of enacting statutes or regulations to protect employees from retaliation.

The Court ultimately extended the Speech Clause's "public concern" test to cases where employees invoke their rights under the Petition Clause. Applying a different test for Petition Clause cases would undermine the government's interests in maintaining effective and efficient government. Government would have to determine whether a public employee's speech or petition qualifies for protection under the Speech Clause, the Petition Clause, or both, and then possibly manage the case under two different analyses. This process can be very burdensome. Applying the "public concern" test to Petition Clause cases would prevent that situation from occurring in the first place.

7. **Concurrence:** Justices Thomas and Scalia separately concurred in the judgment. Both agreed that the Speech Clause's "public concern" test was not appropriate in public employee Petition Clause cases. Instead, both Justices would hold that the Petition Clause protects public employees from retaliation for filing petitions only when the petitions address the government in its capacity as a sovereign, and not as an employer. Justice Thomas would go further and require a balancing test where the public employee's right to petition is weighed against the government's interest in maintaining effective and efficient operations.

I. **Attorney Fees & Frivolous Claims that are Withdrawn or Dropped**: *Fox v. Vice*, 131 S. Ct. 2205, 180 L. Ed. 2d 45, 2011 U.S. LEXIS 4182 (June 6, 2011).

1. **Justices:** Kagan, J., delivered the opinion for a unanimous Court.

2. **Procedural Posture:** Fox appealed to the Fifth Circuit, which affirmed the decision below. The Plaintiff Fox filed a petition for certiorari and the United States Supreme Court granted it.

3. **Issue:** May courts award attorney fees to a defendant under § 1988 based on the plaintiff's voluntary dismissal of one claim in an action where the defendants must still defend against non-frivolous claims that are factually intertwined?

4. **Holding:** When there are both frivolous and non-frivolous claims in a plaintiff's civil rights suit, a court may grant reasonable attorney's fees to the defendant, but only for costs that the defendant would not have incurred but for the frivolous claims. Here, neither the district court nor appellate court applied the "but-for" standard so the Court vacated and remanded.

5. **Key Facts:** Ricky Fox challenged incumbent Billy Ray Vice in an election for police chief in Vinton, Louisiana. Fox asserted that Vice resorted to many "dirty tricks" in an effort to thwart Fox's run. Fox ultimately won the election, and Vice was subsequently convicted for his electioneering tricks.

   Fox filed suit in state court, alleging violations of state law and federal law under 42 U.S.C. §1983. Vice successfully removed the case to federal court, where he filed a motion for summary judgment on Fox's federal claims. After Fox conceded that the federal claims were "not valid," the Court entered summary judgment on those claims and sent the remaining state claims back to state court.

   Vice petitioned the court for attorneys' fees on the federal claims pursuant to 42 U.S.C. § 1988. In doing so, Vice submitted his billing records for the time spent on the entire case. The District Court granted the motion and awarded Vice $48,681 for all the time spent thus far on the case. The District Court reasoned that it was not necessary to separate the state and federal claims for the fee determination because they "arose out of . . . essentially the same facts."

6. **Rationale:** When the defendant prevails in a § 1983 action, the Court may award the defendant attorneys' fees if the "the plaintiff's action was frivolous, unreasonable, or without foundation." This standard is considerably different than fee determinations for plaintiffs, which "ordinarily" allow prevailing plaintiffs to receive an award for attorneys' fees.

   Because "litigation is messy," courts are often put in the position where plaintiffs request attorneys' fees even though they prevailed on less than all of the federal claims. In these situations, plaintiffs can still receive awards, but they cannot receive

compensation for the attorneys' work if that work "bore no relation to the grant of relief." In line with this principle, defendants who prevail on frivolous claims are entitled to compensation for the time spent on those frivolous claims. Alternatively, defendants are not entitled to fees from plaintiffs' non-frivolous claims, even if these claims are prosecuted among frivolous claims.

The statutory text of § 1988 itself provides a "more meaningful" standard. Section 1988 provides that fees may only be awarded if incurred "because of" a frivolous claim. This is essentially a "but-for" standard, which can be characterized as permitting "the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim." This standard is appropriate because the purpose of awarding fees to defendants on frivolous claims is to "relieve defendants of the burdens associated with fending off frivolous litigation." Accordingly, if the defendant incurs fees for frivolous claims that it would have incurred anyway in defense of the non-frivolous claims, the court may not award those fees to the defendant.

There may be cases where the attorneys' work for the frivolous claims overlaps the work done for the non-frivolous claims. In these cases, the probative question will be whether the fees would have been incurred absent the frivolous claims. In other words, the defendant must show that the fees were accrued "solely because" of the frivolous claims.

When district courts award fees, they are not required to "achieve auditing perfection." District courts may appropriately consider their "overall sense of the suit" when estimating or calculating fee awards. And because district courts have the most knowledge about the case, "appellate course must give substantial deference to these determinations."

II. 2011-2012 Employment Law Cases to Watch

A. Private Employees working as Contractors in Public Prisons*: Minneci, et al.,v. Pollard, et al.* No. 10-1104, 131 S. Ct. 2449, 179 L. Ed. 2d 1208, 2011 U.S. LEXIS 3664 (May 16, 2011). Scheduled for Oral Argument on November 1, 2011.

1. **Issue:** Whether federal inmates may sue employees of a private company that provides prison services under the *Bivens* doctrine for Constitutional violations?

2. **Key Facts**: Respondent, a federal prisoner filed suit against contract employees provided by Wachenhut Corrections Corporation. The lawsuit claimed the employees were negligent and deliberately disregarded his Eighth Amendment rights. The district court dismissed the suit refusing to extend liability to the private employees under a *Bivens* theory of liability. The Ninth Circuit Court of Appeals reversed and remanded.

B. Employment Discrimination Ministerial Exception: *Hosanna-Taylor Evangelical Lutheran Church and School v. EEOC***,** No. 10-553, 131 S. Ct. 1783, 179 L. Ed. 2d 653, 2011 U.S. LEXIS 2445 (March 28, 2011) Scheduled for Oral Argument on October 5, 2011.

1. **Issue:** Whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a religious school who teaches secular classes?

2. **Key Facts:** Hosanna-Tabor a Lutheran based church school employed Perich as a fourth grade teacher. The school asked her for her resignation and she threatened litigation. The school board voted to terminate her because of her disruptive behavior in threatening to take legal action. The EEOC filed a complaint against the employer alleging retaliation. The district court granted the employer's motion for summary judgment based on the ministerial exception. The Sixth Circuit Court of Appeals reversed and remanded, holding that the ministerial exception only applied to employees whose primary duties were religious.

C. Class Action & Title VII Claims: *Knox v. Cal. State Emples. Ass'n, Local 1000,* No. 10-1121, 2011 U.S. LEXIS 4827, 79 U.S.L.W. 3727 (June 27, 2011) Oral argument not schedule at this time.

1. **Issue:** Whether non-union employees may constitutionally be required to pay fees to a union to help cover political spending on ballot measures?

2. **Key Facts:** Petitioner represents 28,000 nonmembers of the Service Employees International Union. The non-members are required by state law to pay Local 1000 a "fair share fee" that supports political spending. A notice was sent to the nonmembers informing them of the basis for the additional fee assessment. The nonmembers filed a class action seeking declaratory and injunctive relief under the First and Fourteenth Amendments claiming that the notice was deficient. The Ninth Circuit Court of Appeals reversed and remanded.